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IN THE

Supreme Court of the United States

No. 331.

October Term, 1947.

RUDY E. CALLEN,

Petitioner,

v.

PENNSYLVANIA RAILROAD COMPANY
(Defendant-Appellant in the Court Below),

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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OPINIONS BELOW.

The opinion of the District Court for the Eastern District of Pennsylvania (R. 306a) is not reported and the opinion of the Circuit Court of Appeals for the Third Circuit (R. 313) is reported in 162 Fed. 2d 832.

JURISDICTION.

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925; 28 U. S. C. A., Sec. 347 (a).

QUESTION PRESENTED.

Whether the Circuit Court of Appeals erred in granting a new trial on the ground that the trial Court had committed reversible error in its instructions to the jury by (a) withdrawing from the jury the question whether a release given by the petitioner to respondent was intended by the parties to cover all claims arising out of the alleged injury and (b) in instructing the jury that there was no dispute about the permanency of the alleged injury despite the fact that this was a controverted issue of fact.

STATUTE INVOLVED.

No statutes are involved in the issues presented by the Circuit Court's decision in the instant case, which decision raises only common law questions concerning releases and the granting of a new trial because of errors in the trial court's charge.

STATEMENT.

Petitioner brought a suit under the Federal Employers' Liability Act to recover for an injury to his back alleged to have been received on December 14, 1944. The complaint alleged that the injury was incurred when the petitioner was forced to jump from an engine to the ground as a result of the negligence of the respondent (R. 4a-6a).[1]

At the trial petitioner testified that he had twisted his back when he had jumped from a tender which was about to make a coupling with standing cars and was running so fast that he thought the coupling operation unsafe (R. 19a).

In a statement given to the respondent's claim agent prior to the settlement and compromise of the claim, the petitioner stated that while engaged in a switching operation he jumped off a tender and his left foot may have landed on some ice, but that he did not know what made him slip (R. 81a).

In the same statement the petitioner stated that the engine was moving at a "moderately fast walking pace" and was moving slower than many engines from which he had jumped (R. 79a, 80a).

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[1] Respondent offered evidence that the petitioner, although regularly employed as a brakeman, did not work for the respondent on December 14, 1944 (R. 146a, 206a, 237a). There was also evidence that the petitioner advised a conductor employed by the respondent a few days after the date of the alleged accident that he had not worked on December 12th or 14th because he was shoveling snow to get his car out of the garage and that he had hurt his back throwing a derail (R. 147a).

At the trial respondent showed that the coupling operation was effected at a speed of less than two miles per hour and this testimony was in part corroborated by the petitioner, who acknowledged that no damage resulted to the equipment (R. 19a, 83a, 154a, 193a, 219a, 224a). Petitioner's own expert witness testified that coupling at a speed greater than a mile and a half per hour was likely to damage the equipment (R. 94a).

Respondent pleaded a release of all claims arising from the injury, executed by the petitioner for a payment of $250. Petitioner testified that on February 14, 1945, he had executed a full release of all claims for injuries sustained in the accident but gave as his excuse for doing so that the respondent's claim agent had said there was nothing wrong with him and that he could go back to work (R. 27a). He testified that he had done this although his back had pained him severely during the period that he was receiving chiropractic treatment (R. 23a) which was the two month period from the date of the alleged accident to the time when he executed the release. He further testified that at the very time when he executed the release his back pained him so that he could hardly sit on a chair (R. 26a) and that a report (Defendant's Exhibit 3, R. 274a) by one of his own doctors, dated February 13, 1944 (the day before the execution of the release) and procured by the petitioner himself, showed that he was suffering from "nerve pressure and inflammation in sacro illiac and lower lumbar region of the spine." Petitioner's doctor's report further indicated that the petitioner had not been discharged at the time of the execution of the release, and that the injury "leaves a weakness which is more readily increased and makes him more susceptible to recurrence." Petitioner also testified that he had read and understood the release and intended to waive any further claim against the respondent (R. 54a, 55a).

Respondent's evidence indicated that the agreement for the release was made because petitioner's version of

the alleged accident, given to the respondent's claim agent at the time of the settlement, showed no negligence or liability on the part of the respondent and that the amount paid in settlement was determined accordingly (R. 248a, 251a, 252a, 253a, 256a, 257a).

The pleadings raised the issue whether the petitioner's injuries were permanent (R. 4a-8a). The respondent presented no medical evidence at the trial, and petitioner called two doctors. One of the doctors had examined the petitioner before the execution of the release. This doctor testified that the petitioner's injuries were permanent but the testimony of this doctor showed that his initial examination of the petitioner disclosed the same injuries that were described in a report which the petitioner had obtained from another doctor and had furnished to the respondent the day before the release was executed (R. 124a, 125a, 128a; Defendant's Exhibit 3, R. 274a). The other doctor called by the petitioner had not examined the petitioner until after the execution of the release. He had also diagnosed the petitioner as suffering from chronic low back strain, but he testified that he could not say whether the condition was permanent (R. 115a, 117a).

On the question of the validity and scope of the release the trial judge instructed the jury as follows (R. 281a):

> "Anyhow, they settled to the extent of $250.00, and the release has been offered in evidence and admitted, and both sides agree that that release was not in contemplation of any sort of permanent injury."
>
> "Now, members of the jury, you cannot agree to something you don't know anything about and didn't intend to cover. I want to make this statement, and I hope that the defendant will not object to it, because I can't imagine that a responsible and reputable employer, whether individual or corporate, would knowingly,—knowingly,—commit a fraud on an employee. I think if it had been known that this man had these

permanent injuries Mr. Veidt would not have handled the matter; it would probably have gone to Chicago where Mr. Callen said he was sent when he couldn't settle for $500.00. Therefore that release was given and taken, and Mr. Callen received $250.00.

"Now, I am going to consider that release as binding to the amount of $250.00, and if you find a verdict for the plaintiff you will deduct that from any amount you would otherwise give him. The $250.00 he got for expenses and medical bills and services that he obtained up to that time; and if you find that he is entitled to a verdict at your hands I will ask you to deduct that $250.00 from any amount you otherwise would award him, because that is what he agreed to take toward that particular phase of his claim, and of course he would not and does not ask, as I understand it to be excused from that,—he admits that he got it, and there it is.

"The release, as I have told the attorneys for both sides, I do not consider binding insofar as it applies to his permanent injuries, because the Pennsylvania Railroad certainly didn't know he was permanently injured, and if they did know he was permanently injured and settled for $250.00 the comment of the Court might be entirely different." (R. 281a-282a.)

The statement that "both sides agree that the release was not in contemplation of any sort of permanent injury" was incorrect. At the trial it was respondent's contention that the release was intended to cover all injuries suffered by the petitioner.

The words "if it had been known that this man had these permanent injuries", and the words "The release • • • I do not consider binding insofar as it applies to his permanent injuries" assumed that petitioner was permanently injured and in effect withdrew the question of

whether his injuries were, in fact, permanent from the consideration of the jury.

Respondent requested a number of instructions concerning the validity and effect of the release (R. 299a-301a). Some of these requested charges were read to the jury by the trial judge despite the fact that they were clearly inconsistent with that part of the charge which had removed the question of the validity and effect of the release from the jury's consideration (R. 288a-290a). Point No. 6 in the instructions submitted by the respondent related directly to the effect and validity of the release. This instruction was read to the jury by the trial judge with qualifying language that indicated to the jury that it should not regard the release as covering the permanent injuries which the Court's charge assumed existed[2] (R. 289a).

Respondent's motion for a directed verdict (R. 303a) was denied and the jury returned a verdict for the petitioner for $24,990.00. Thereafter respondent duly filed its

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[2] In his qualification of this requested charge the trial judge said, speaking of the plaintiff: "But, he did state he didn't know he was permanently injured, and Mr. Veidt said he didn't know he was permanently injured, and they both settled on the basis of loss of wages and expenses and because Mr. Veidt felt there was no liability and that it was just a local matter" (R. 289a). Veidt, who was respondent's claim agent, did not testify that at the time of the execution of the release "he didn't know he (petitioner) was permanently injured." What Veidt testified was that when the release was executed he did not know that the petitioner was suffering from the injuries that petitioner's witnesses had described during the trial of the case (R. 256a). This was not an admission that the injuries were permanent.

The respondent excepted to the Court's assumption that the petitioner's injuries were permanent and that this was not known at the time of the release so that the release could not be construed as covering those injuries (R. 295a, 296a). Respondent also excepted to the Court's qualification of the respondent's requested instruction No. 6 (R. 293a).

motion for a new trial (R. 305a). Respondent's motion was refused and an appeal to the Circuit Court followed. Respondent raised the issue of the instructions concerning the release in its statement of points on which it intended to rely in the Circuit Court and this was argued at length both in the briefs and at the oral argument in the Circuit Court (Appellant's brief below, pp. 1, 6-16). The question of the errors in the charge concerning the permanency of plaintiff's injuries was also argued extensively in the briefs and at the bar of the Circuit Court (Appellant's brief below, pp. 1, 16-17).

In its opinion the Circuit Court of Appeals, after quoting that portion of the judge's charge with respect to the validity and effect of the release, which has been set forth at pages 4 and 5, *supra*, reviewed the other instructions that the trial court had given to the jury and then said:

> "Prior to charging appellant's points above quoted, the District Judge had advised the jury that the release was not binding insofar as it applied to appellee's permanent injuries. This was palpable error under the facts relating to the release, and entirely aside from the Court's incorrect assumption that there was no dispute about the permanency of the injuries." (R. 317.)

The Circuit Court of Appeals also said:

> "Though the permanency of appellee's injuries was one of the controverted issues both in the pleadings and at the trial, the District Judge in his charge mistakenly advised the jury in the above noted instructions that appellee had been permanently injured and that this was conceded by the appellant." (R. 318.)

The Circuit Court of Appeals held that in these respects the instructions of the District Court were erroneous and reversed the judgment and remanded the case for a new trial.

ARGUMENT.

I. Certiorari Should Be Denied Because the Order Involved Is Interlocutory and Does Not Involve Questions of Peculiar Gravity or General Importance.

This Court has said that its power under Section 240 of the Judicial Code to review an interlocutory order by the issuance of a writ of certiorari should be "exercised sparingly, and only in cases of peculiar gravity and general importance, or in order to secure uniformity of decision." *Hamilton-Brown Shoe Company v. Wolf Brothers*, 240 U. S. 251, 258 (1916); *Denver v. New York Trust Company*, 229 U. S. 123, 133 (1913); *American Construction Company v. Jacksonville T. & K. W. Ry. Co.*, 148 U. S. 372, 384 (1893).

In the case at bar the Circuit Court of Appeals ordered a new trial on the grounds that the District Court's instructions to the jury were incorrect in two respects: First, the instructions assumed that both petitioner and respondent agreed that petitioner's injuries were permanent when in fact this was a controverted issue of fact in the case; and Second, The District Court in effect instructed the jury that at the time the release was executed neither the respondent nor the petitioner intended that the release should cover the permanent injuries which the District Court assumed that the petitioner had suffered. Thus the Circuit Court of Appeals viewed the District Court's instructions as withdrawing from the jury two controverted issues of fact. Whether these two issues of fact should have been decided by the jury and not by the District Judge is the only question properly raised by the petition.

The proposition that it was for the jury and not the District Judge to decide whether the petitioner's injuries were in fact permanent and whether at the time the release was executed the petitioner and respondent intended the release to cover all of the injuries that the petitioner had suffered, is so clearly correct that no citation of authority

or argument should be necessary to support it. The decision of the Court of Appeals applying this principle of law to the instructions of the District Court does not raise any grave question of general importance that requires or justifies decision by this Court. The petitioner seems tacitly to concede this point because it seeks to justify its petition by reference to a question that was not decided by the Circuit Court of Appeals and that is not raised by the present record. (See pages 10-11, *infra*).

The decisions cited by the petitioner to justify the issuance of the writ do not relate to situations comparable to the case at bar. Thus *Spiller v. A. T. & S. F. Ry.*, 253 U. S. 117 (1920), involved important questions with respect to the statutory power of the Interstate Commerce Commission to investigate claims for reparation and with respect to the procedure that the Commission should follow in investigating such claims. In *Tiller v. Atlantic Coast Line R. R. Co.*, 323 U. S. 574 (1945), the question presented was whether the failure of a carrier to have a light in the rear of an engine was as a matter of law sufficient evidence of negligence to raise an issue for the jury. Certiorari was granted "because of the importance of questions involved relating to the administration and enforcement of the Federal Employers Liability Act" (323 U. S. at p. 576).[3] Similarly in *American Construction Co. v. Jacksonville T. & K. W. Ry.*, 148 U. S. 372 (1893), the question raised was whether Section 3 of the Judiciary Act of 1891 prevented a judge who had decided a case in a lower Court from participating in the hearing of the case in the Circuit Court of Appeals. This Court described that question as "a novel and important one, deeply affecting the administration of justice in the Circuit Court of Appeals" (148 U. S. 372, 387).

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[3] In this connection it should be noted that in the *Tiller* case there had already been two trials in the District Court. See *Tiller v. Atl. Coast Line R. R.*, 318 U. S. 54 (1943).

II. The Petition Does Not Raise Any Issue With Respect to the Burden of Proof; the Circuit Court of Appeals Did Not Reverse the Judgment Below on the Ground That It Was the Burden of the Plaintiff to Prove That the Release Had Been Executed by Mistake.

Much of the argument in the petition assumes that the Circuit Court reversed the judgment of the District Court and ordered a new trial on the ground that it was the burden of the petitioner to show by clear and convincing evidence that the release had been executed by mistake. This was not the basis of the opinion of the Circuit Court of Appeals. That Court held only that the instructions were erroneous because they, in effect, withdrew from the jury the question whether the petitioner's injuries were permanent and the question whether when the parties executed the release they intended the release to cover all of the injuries suffered by petitioner. In fact the respondent did not ask the trial court to instruct the jury that it was the burden of the plaintiff to prove that the release was executed by mistake. The respondent itself had offered testimony at the trial designed to show that the release had not been executed under mistake of fact. Apart from any question of the burden of proof the respondent was entitled to have this evidence considered by the jury.

So far as the petitioner's argument is directed to the proposition that it is the burden of the employer to sustain a release the argument is irrelevant. If it were appropriate to do so, the respondent would contend that in a case arising under the Federal Employers Liability Act, it is the burden of the employee to prove that a release is invalid because executed under a mistake of fact and not the burden of the employer to sustain the validity of the release.[4] The re-

[4] See *Restatement of Contracts*, Sections 502, 504, 511, *Chicago & Northwestern Ry. Co. v. Wilcox*, 116 Fed. 913 (CCA 8th, 1902), *The Lion Oil Co. v. Albritton*, 21 Fed. 2d 280 (CCA 8th, 1927), *Atlantic Greyhound Lines v. Metz*, 70 Fed. 2d 166, 168 (CCA 4th, 1934).

spondent, however, does not now press this contention because the issue is not raised by the case in its present posture.

In any event the District Court's error in withdrawing from the jury the question whether the petitioner's injuries were permanent was an error that had nothing to do with the burden of proof. That error, considered alone and without reference to the release, justifies the action of the Circuit Court of Appeals in reversing the judgment.

III. There Is No Conflict Between the Decision of the Circuit Court of Appeals and the Decisions of Circuit Courts of Appeals in Other Circuits.

No other Circuit Court of Appeals has held that in a suit under the Federal Employers Liability Act the District Court is entitled to withdraw from the jury the question whether the alleged injuries are permanent or the question whether the parties intended that a release should cover all of the injuries actually incurred. The decisions cited by the petitioner all relate to other issues. For example, in *Steele v. Erie R. R. Co.*, 54 Fed. 2d 688 (W. D. N. Y., 1931), affirmed *per curiam* 54 Fed. 2d 690 (CCA 2d, 1931), and *Scheer v. Rockne Motor Corporation*, 68 Fed. 2d 942 (CCA 2d, 1934), the question for decision was whether on the facts the mistake alleged was a mistake of fact or merely a mistake in prophecy or opinion and therefore insufficient to invalidate the release. In *Ricketts v. P. R. R. Co.*, 153 Fed. 2d 757 (CCA 2d, 1946), the Circuit Court of Appeals for the Second Circuit affirmed a judgment for the plaintiff on the ground that a release pleaded by way of defense had been executed by an attorney who was not authorized to release a claim for personal injuries. The opinion of the Circuit Court of Appeals in that case assumed that the jury had found that the attorney had no authority to release the claim for personal injuries. There is no suggestion in the opinion of Circuit Judge L. Hand or in the concurring

opinion of Circuit Judge Frank that the District Judge was entitled to withdraw from the jury either that question of fact or any other question of fact relating to the validity of the release.

IV. There Is No Merit in Petitioner's Contention That the Circuit Court Reversed on an Issue Not Raised in the Trial Court and Not Arising on the Record.

The petitioner asserts that the Circuit Court of Appeals reversed on an issue that was not raised in the trial court and that does not arise on the record. This argument rests on the petitioner's misconception of the grounds of the decision of the Circuit Court of Appeals. That Court did not hold that the District Court had committed error by failing to instruct the jury that it was the burden of the petitioner to prove that the release was executed by mistake. On the contrary, the Court of Appeals held that the charge of the District Court was erroneous because it withdrew from the jury issues of fact that it was for the jury and not for the District Court to decide.

It is true, as petitioner asserts, that respondent did not request the District Court to instruct the jury that it was the burden of the petitioner to prove that the release was invalidated by mistake. But the omission to request that charge is not significant because the case did not turn either in the District Court or in the Circuit Court of Appeals on any question relating to the burden of proof. It was not the failure of the District Court to charge the jury with respect to the burden of proof, but rather those portions of the District Court's instruction which in effect charged the jury that the petitioner's injuries were permanent and that both the respondent and the petitioner did not intend the release to cover all of the injuries actually suffered, that was reversible error. Respondent duly excepted to this portion of the charge and consequently was entitled to raise the question on appeal. Respondent's motion for a new

trial again assigned as error the Court's instruction with respect to the effect of the release (R. 305a). The same question was raised in respondent's statement of points on which it intended to rely on appeal and the propriety of the portions of the charge that related to the release was argued in the respondent's brief in the Court below.

CONCLUSION.

The respondent submits that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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